

# **EXHIBIT F-4B**

Case 2:04-cv-01599-JCC Document 38 Filed 11/30/2004 Page 1 of 4

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SOUTH FERRY LP #2, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

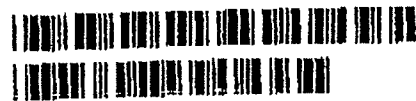
vs.

KERRY K. KILLINGER, THOMAS W. CASEY,  
DEANNA W. OPPENHEIMER, WILLIAM W.  
LONGBRAKE, CRAIG J. CHAPMAN, JAMES  
G. VANASEK, MICHELLE MCCARTHY, and  
WASHINGTON MUTUAL INC.,

Defendants.

Master File No. CV04-1599C

[PROPOSED] ORDER APPOINTING  
LEAD PLAINTIFFS AND  
APPROVING LEAD PLAINTIFFS'  
SELECTION OF COUNSEL



04-CV-01599-ORD

Milberg Weiss Bershad & Shulman LLP  
1001 Fourth Avenue, Suite 2550  
Seattle, WA 98154  
Telephone: 206/839-0730 • Fax: 206/839-0728

1 Having considered The WAMU Investors Lead Plaintiff Group's Motion for  
2 Appointment of Lead Plaintiff and Approval of Selection of Plaintiffs' Lead Counsel (the  
3 "Motion"), and good cause appearing therefor, it is hereby ORDERED that:

4 1. The Motion is GRANTED.

5 2. The Court, having considered the provision of § 21D(a)(3)(B), as amended by the  
6 PSLRA, hereby determines that The WAMU Investors Lead Plaintiff Group, consisting of  
7 Metzler Investment GmbH, South Ferry LP #2, and The Walden Management Co. Pension Plan,  
8 is appointed as Lead Plaintiff in this action.

9 3. Lead Plaintiffs' selection of Lead Counsel is approved. Pursuant to 15 U.S.C.  
10 § 78u-4(a)(3)(B)(v), the law firm of Milberg Weiss Bershad & Schulman LLP is appointed as  
11 Lead Counsel in this consolidated action.

12 4. Lead Counsel for the class shall have the following responsibilities and duties, to  
13 be carried out either personally or through counsel whom Lead Counsel shall designate:

- 14 a. To coordinate the briefing and argument of motions;
- 15 b. To coordinate the conduct of discovery proceedings;
- 16 c. To coordinate the examination of witnesses in depositions;
- 17 d. To coordinate the selection of counsel to act as spokesperson at pretrial  
18 conferences;
- 19 e. To call meetings of counsel as they deem necessary and appropriate from  
20 time to time;
- 21 f. To coordinate all settlement negotiations with counsel for defendants;
- 22 g. To coordinate and direct the pretrial discovery proceedings and the  
23 preparation for trial and the trial of this matter, and to delegate work responsibilities to selected  
24 counsel as may be required; and
- 25 h. To supervise any other matters concerning the prosecution or resolution of  
26 the related and/or consolidated actions.


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1 5. No motion, request for discovery, or other pretrial proceedings shall be initiated  
2 or filed by any plaintiff in this action without the approval of Lead Counsel, so as to prevent  
3 duplicative pleadings or discovery by plaintiffs in this action. No settlement negotiations shall be  
4 conducted in this action without the approval of Lead Counsel.

5 6. Defendants' counsel may rely upon agreements made with Lead Counsel. Such  
6 agreements shall be binding on plaintiffs.

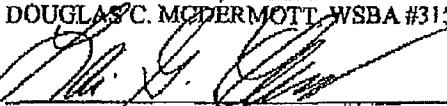
7 7. Any counsel of record for a party in this action who is not a member of the Bar of  
8 this District is hereby admitted to practice *pro hac vice* in this action.

9 Dated this 30 day of Nov, 2004.

10  
11   
12 HONORABLE JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE

13 Presented by:

14 MILBERG WEISS BERSHAD  
15 & SCHULMAN LLP  
LORI G. FELDMAN, WSBA #29096  
DOUGLAS C. McDERMOTT, WSBA #31500

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20 -and-

21 MILBERG WEISS BERSHAD  
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[Proposed] Lead Counsel for Plaintiffs

[PROPOSED] ORDER APPOINTING LEAD PLAINTIFFS AND  
APPROVING LEAD PLAINTIFFS' SELECTION OF COUNSEL  
(Master File No. CV04-1599C)  
DOCS226008V1

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Case 2:04-cv-01599-JCC Document 38 Filed 11/30/2004 Page 4 of 4

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15 **Plaintiff's Counsel**  
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[PROPOSED] ORDER APPOINTING LEAD PLAINTIFFS AND  
APPROVING LEAD PLAINTIFFS' SELECTION OF COUNSEL  
(Master File No. CV04-1599C)  
DOCS22608V1

- 3 -

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Case 2:04-cv-05025-P CW Document 81 Filed 11/01/2004 Page 1 of 10

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PETER E. SEIDMAN  
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(212) 868-1229 (fax)

Proposed Lead Counsel

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

CONWAY INVESTMENT CLUB,  
Individually and On Behalf of All  
Others Similarly Situated,

Plaintiff,

vs.  
CORINTHIAN COLLEGES, INC.,  
DAVID MOORE, ANTHONY  
DIGIOVANNI and DENNIS BEAL,

Defendant.

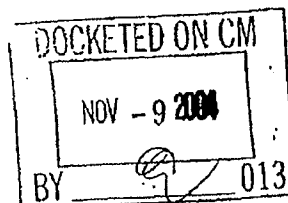
Case No. 2:04-cv-05025

~~PROPOSED~~ ORDER  
CONSOLIDATING THE ACTIONS,  
APPOINTING LEAD PLAINTIFF,  
AND APPROVING SELECTION OF  
LEAD COUNSEL

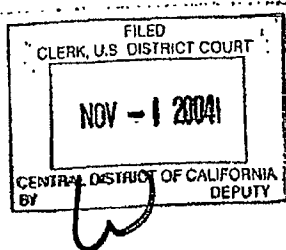
Date: October 4, 2004  
Time: 10:00 a.m.  
Courtroom: Honorable Manuel L.  
Real

Date Action Filed: July 8, 2004

(Additional Captions Set Forth Below)



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Case 2:04-cv-05025-5 CW Document 81 Filed 11/01/2004 Page 2 of 10

1 BARBARA KAUFMAN, On Behalf of  
2 Herself and All Others Similarly  
Situating,

3 Plaintiff,

4 vs.

5 CORINTHIAN COLLEGES, INC.,  
6 DAVID G. MOORE, DENNIS N.  
BEAL, AND ANTHONY F.  
DIGIOVANNI,

7 Defendant.  
8

Case No. 2:04-cv-05091 ✓

Judge: Honorable Manuel L. Real  
Courtroom: 8  
Date Action Filed: July 8, 2004

SCANNED

9  
10 MICHAEL ORLANDO, Individually  
and On Behalf of All Others Similarly  
Situating,

11 Plaintiff,

12 vs.

13 CORINTHIAN COLLEGES, INC.,  
14 DAVID MOORE, ANTHONY  
DIGIOVANNI and DENNIS BEAL,

15 Defendant.  
16

Case No. 2:04-cv-05754 ✓

Judge: Honorable Manuel L. Real  
Date Action Filed: July 16, 2004

17 PAULENA PARTNERS, LLC,  
18 Individually and On Behalf of All  
Others Similarly Situating,

19 Plaintiff,

20 vs.

21 CORINTHIAN COLLEGES, INC.,  
22 DAVID MOORE, ANTHONY  
DIGIOVANNI and DENNIS BEAL,

23 Defendant.  
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Case No. 2:04-cv-06057 R ✓

Judge: Honorable Dale S. Fischer  
Date Action Filed: July 23, 2004

Case 2:04-cv-05025-P-CW Document 81 Filed 11/01/2004 Page 3 of 10

1 JAMES DOLAN, On Behalf of Himself  
2 and All Others Similarly Situated,

3 Plaintiff,

4 vs.

5 CORINTHIAN COLLEGES, INC.,  
6 DAVID MOORE, PAUL ST. PIERRE,  
7 DENNIS BEAL, and ANTHONY  
DIGIOVANNI,

8 Defendant.

Case No. 2:04-cv-06076 ✓

Judge: Honorable Manuel L. Real  
Date Action Filed: July 23, 2004

SCANNED

9 KWOK YAU TONG, Individually and  
10 On Behalf of All Others Similarly  
Situated,

11 Plaintiff,

12 vs.

13 CORINTHIAN COLLEGES, INC.,  
14 DAVID MOORE, ANTHONY  
DIGIOVANNI and DENNIS BEAL,

15 Defendant.

Case No. 2:04-cv-06993 ✓

Judge: Honorable Manuel L. Real  
Date Action Filed: August 20, 2004

16  
17 DOUGLAS ROSE, On Behalf of  
18 Himself and All Others Similarly  
Situated,

19 Plaintiff,

20 vs.

21 CORINTHIAN COLLEGES, INC.,  
22 DAVID MOORE, PAUL ST. PIERRE,  
DENNIS BEAL and ANTHONY  
DIGIOVANNI,

23 Defendant.

Case No. 2:04-cv-06994 ✓

Judge: Honorable Manuel L. Real  
Date Action Filed: August 20, 2004

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Case 2:04-cv-05025-P-CW Document 81 Filed 11/01/2004 Page 4 of 10

1 IVAN MENESES, Individually and on  
2 Behalf of All Others Similarly Situated,

3 Plaintiff,

4 vs.

5 CORINTHIAN COLLEGES, INC.,  
6 ANTHONY DIGIOVANNI, DAVID  
7 MOORE and DENNIS BEAL,

8 Defendant.

Case No. ~~8:04-cv-923~~

2:04-0513

Judge: Honorable David O. Carter  
Date Action Filed: August 4, 2004

SCANNED

64-6994

9 DOUGLAS ROSE, On Behalf of  
10 Himself and All Others Similarly  
11 Situated,

12 Plaintiff,

13 vs.

14 CORINTHIAN COLLEGES, INC.,  
15 DAVID MOORE, PAUL ST. PIERRE,  
16 DENNIS BEAL and ANTHONY  
17 DIGIOVANNI,

18 Defendant.

Case No. ~~8:04-cv-926~~

Judge: Honorable David O. Carter  
Date Action Filed: August 5, 2004

19 KOK YEOH, On Behalf of Himself and  
20 All Others Similarly Situated,

21 Plaintiff,

22 vs.

23 CORINTHIAN COLLEGES, INC.,  
24 DAVID MOORE, PAUL ST. PIERRE,  
25 DENNIS BEAL and ANTHONY  
26 DIGIOVANNI,

27 Defendant.

Case No. ~~8:04-cv-959~~

64-8393

Judge: Honorable Gary L. Taylor  
Date Action Filed: August 9, 2004

Case 2:04-cv-05025-PJW Document 81 Filed 11/01/2004 Page 5 of 10

1 JAMES STELLATO, On Behalf of  
2 Himself and All Others Similarly  
3 Situated,

Plaintiff,

4 vs.

5 CORINTHIAN COLLEGES, INC.,  
6 DAVID MOORE, PAUL ST. PIERRE,  
7 DENNIS BEAL and ANTHONY  
8 DIGIOVANNI,

Defendant.

Case No. ~~8:04-cv-997~~

*OK 8/16/04 R*

Judge: Honorable David O. Carter  
Date Action Filed: August 16, 2004

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Case 2:04-cv-05025-CW Document 81 Filed 11/01/2004 Page 6 of 10

1 Having considered the motion of Metzler Investment GmbH ("Metzler  
2 Investment"), and good cause appearing therefore, the Court orders as follows:

3  
4 1. The Motion is GRANTED; ~~≠~~


5 2. The above-captioned actions are consolidated pursuant to Fed. R. Civ. P.  
6 42(a);

7  
8 3. Metzler Investment is the "most adequate plaintiff" and accordingly, is  
9 appointed Lead Plaintiff pursuant to 15 U.S.C. 78u-4(a)(3)(B)(iii);

10 4. Milberg Weiss Bershad & Schulman LLP is appointed Lead Counsel,  
11 pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

12 IT IS SO ORDERED.


13  
14 DATED: Nov. 1, 2004

  
Honorable Manuel L. Real  
United States District Court Judge

15 Submitted by:

16 Dated: September 7, 2004

17 MILBERG WEISS BERSHAD  
18 & SCHULMAN LLP  
19 Jeff S. Westerman

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28 Proposed Lead Counsel

SCANNED

Case 2:04-cv-05025-BW Document 81 Filed 11/01/2004 Page 7 of 10

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Case 2:04-cv-05025-CW Document 81 Filed 11/01/2004 Page 8 of 10

DECLARATION OF SERVICE BY MAIL


I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 355 South Grand Avenue, Suite 4170, Los Angeles, California 90071.

2. That on September 7, 2004, declarant served the [PROPOSED] ORDER CONSOLIDATING THE ACTIONS, APPOINTING LEAD PLAINTIFF AND APPROVING SELECTION OF LEAD COUNSEL by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7<sup>TH</sup> day of September, 2004, at Los Angeles, California.

  
CYNTHIA DORSEY

SCANNED

Case 2:04-cv-05025-PJW Document 81 Filed 11/01/2004 Page 9 of 10

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DOCS223239v1

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SCANNED

Case 3:04-cv-02275-SI Document 51 Filed 09/28/2004 Page 1 of 9

United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD CURTIS, on behalf of himself and  
all others similarly situated,

No. C 04-2275 SI

Plaintiffs,

**CLASS ACTION**

v.

**ORDER CONSOLIDATING ACTIONS  
AND APPOINTING LEAD PLAINTIFF  
AND LEAD COUNSEL**

BEA SYSTEMS, INC., ALFRED S. CHUANG,  
CHARLES L. ILL, III, and THOMAS M.  
ASHBURN,

Defendants.

On September 24, 2004, the Court heard argument on motions to consolidate various related securities class actions and competing motions to appoint lead plaintiff and lead counsel. Having considered the papers filed and the argument of counsel, the Court GRANTS the motion to consolidate these actions, appoints ARCA S.p.A. lead plaintiff and appoints its counsel, Green & Jigarjian and Schiffrin & Barroway, lead counsel.

**BACKGROUND**

Plaintiffs Tareq Zuaiter, John E. Kalil, and Roland Pardun ("the Zuaiter Group") and ARCA S.G.R. S.p.A. ("ARCA") are members of a class bringing a securities class action against defendant BEA Systems, Inc. ("BEA Systems" or the "Company") under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "'34 Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5.

BEA Systems is a provider of application infrastructure software and related services. Compl. ¶ 2. Specifically, a product called the "BEA WebLogic Enterprise Platform" provides application infrastructure "for building and deploying distributed, integrated information technology environments, allowing customers to



Case 3:04-cv-02275-SI Document 51 Filed 09/28/2004 Page 2 of 9

1 integrate private client/server networks, the Internet, intranets, extranets, virtual private networks, and  
2 mainframe and legacy systems as system components." Id. The Company's executive offices are in San Jose,  
3 where its day-to-day operations occur. Id. at ¶ 7(b). Plaintiffs allege that the Company and certain of its  
4 officers and directors artificially inflated the Company's stock price during the class period, November 13,  
5 2003 through May 13, 2004, by issuing materially false and misleading statements regarding BEA's business  
6 and prospects. Id. at ¶ 3.

7 On May 13, 2004, BEA reported disappointing first quarter results and attributed these results to "the  
8 difficult selling environment" and "sales execution issues." Id. at ¶ 3. Company shares fell 30% to \$8 per  
9 share. Id. at ¶ 3. Plaintiffs allege that defendants knew and concealed the real reasons for the first quarter  
10 results: (1) the Company was experiencing sales execution problems in its licensing division, which would result  
11 in license reserve being down; (2) a reorganization of the Company's sales' personnel disrupted sales during  
12 the preceding quarter; (3) the Company's WebLogic 8.1 Platform product was not selling as well as defendants  
13 claimed, and was not "revolutionary"; (4) the Company's North American reserves were disrupted by a  
14 transfer of medium and small businesses to the General Accounts Team; and (5) the Company was  
15 experiencing weakness in its telecom vertical business. Id. at ¶¶ 4(a)-(d); 23(a)-(e).

16 Because of defendants' false statements, the Company's stock price traded at inflated prices, as high  
17 as \$14 per share. Id. at ¶ 5. The Company's officers and directors sold more than \$13 million worth when  
18 the stock traded at its allegedly artificially inflated price. Id. Plaintiff and other class members allegedly suffered  
19 injury when they purchased the Company's stock at artificially inflated prices. Id. at ¶ 27-28.

20 The first of seven related securities class actions was filed against BEA Systems on June 9, 2004.  
21 ARCA Mot. for Appointment as Lead Plaintiff ("ARCA Mot.") at 3:12. Between June 9, 2004 and July 17,  
22 2004, six more suits were filed in this District. Id. at 1:15-16. As required by § 21 D(a)(3)(A)(i) of the  
23 Exchange Act, a notice was published over Business Wire on June 9, 2004, advising class members of the  
24 existence and nature of the litigation. Decl. of Patrice L. Bishop ("Bishop Decl."), Ex. A; Decl. of Darren J.  
25 Check ("Check Decl."), Ex. B. The notice set a 60 day window for class members to appear and move for  
26 appointment as lead plaintiff, by August 9, 2004. Id. Three motions were filed within the time limit, two of  
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Case 3:04-cv-02275-SI Document 51 Filed 09/28/2004 Page 3 of 9

1 which are now before the Court, one by the Zuaite Group, and one by ARCA.<sup>1</sup> In addition, both movants  
2 have moved to have all the actions consolidated.

3 The Zuaite Group is comprised of three individuals who collectively purchased 48,380 shares of BEA  
4 systems stock during the Class Period. Zuaite Group's Mot. for Appointment as Lead Plaintiff ("Zuaite  
5 Group Mot.") at 5:9-10. ARCA is a mutual fund manager based in Milan, Italy. ARCA Mot. at 2:4; Decl.  
6 of John W. Pillette ("Pillette Decl."), Ex. A (Decl. of Dr. Attilio Ferrari) ¶ 2.

7 Now before the Court are the two competing motions for appointment of lead plaintiff and approval  
8 of counsel, one by the Zuaite Group, represented by Stull, Stull & Brody, LLP; and one by ARCA,  
9 represented by Schifffrin & Barroway, LLP and Green and Jigarjian, LLP.

#### 11 LEGAL STANDARD

##### 12 A. Motion to consolidate

13 Under Rule 42(a) of the Federal Rules of Civil Procedure:

14 When actions involving a common question of law or fact are pending before the court, it may order  
15 a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions  
16 consolidated; and it may make such orders concerning proceedings therein as may tend to avoid  
unnecessary costs or delay.

17 Courts have recognized that securities class actions are particularly suited to consolidation to help expedite  
18 pretrial proceedings, reduce case duplication, avoid the involvement of parties and witnesses in multiple  
19 proceedings, and minimize the expenditure of time and money by everyone involved. See In re Equity Funding  
20 of Amer. Sec. Litig., 416 F. Supp. 161, 176 (C.D. Cal. 1976) (citation omitted). A court must rule on a  
21 motion to consolidate before it can rule on a motion to appoint a lead plaintiff. Securities Exchange Act, §  
22 21D(a)(3)(B)(ii), 15 U.S.C. § 78u-4(a)(3)(B)(ii).

##### 24 B. Motion to appoint lead plaintiff

25 It has been long recognized that private securities litigation provides "a most effective weapon in the  
26

27  
28 <sup>1</sup> Cement Masons and Plasterers Retirement Trust, Brian A. Metz and Mustapha Bahij also filed a  
motion for appointment of lead plaintiff and counsel, but withdrew that motion on August 27, 2004.

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1 enforcement' of the securities laws and [is] 'a necessary supplement to [administrative] action.'" Bateman  
2 Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310, 105 S. Ct. 2622 (1985). Although Congress  
3 affirmed that such litigation "is an indispensable tool with which defrauded investors can recover losses," it  
4 enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) in response to a widespread perception  
5 of abuse in securities class actions. Joint Explanatory Statement of the Committee of Conf., Conference Report  
6 on Sec. Litig. Reform, H.R. Conf. Rep. No. 104-39 at 31 (1995). Section 21D of the PSLRA provides  
7 well-defined standards and procedures for selecting lead plaintiffs in a securities class action and is "intended  
8 to encourage the most capable representatives of the plaintiff class to participate in class action litigation and  
9 to exercise supervision and control of the lawyers for the class." H.R. 104-39 at 32. See generally In re  
10 Microstrategy Inc. Sec. Litig., 110 F. Supp. 2d 427, 432-436 (E.D. Va. 2000).

11 Under the procedures set out in the PSLRA, all proposed lead plaintiffs must have submitted a sworn  
12 certification setting forth certain facts designed to assure the court that the plaintiff (i) has suffered more than  
13 a nominal loss, (ii) is not a professional litigant, and (iii) is otherwise interested and able to serve as a class  
14 representative. 15 U.S.C. § 78u-4(a)(2)(A). The plaintiff in the first lawsuit to be filed must additionally  
15 publish notice of the complaint in a widely circulated business publication within twenty days of filing the  
16 complaint. Id. at § 78u-4(a)(3)(A)(i). The notice must include a description of the claim and notify  
17 prospective class members that they may move within 60 days of the notice to be named lead plaintiff.

18 Once applications for lead plaintiff status are closed, the district court must determine who among the  
19 movants for lead plaintiff status is the "most adequate plaintiff." Id. at § 78u-4(a)(3)(B)(i). The PSLRA directs  
20 courts to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court  
21 determines to be most capable of adequately representing the interests of class members . . . ." Id. Toward  
22 this end, the court must consider three factors: "the court shall adopt a presumption that the most adequate  
23 plaintiff . . . is the person or group of persons that - (aa) has either filed the complaint or made a motion in  
24 response to a notice . . . ; (bb) in the determination of the court, has the largest financial interest in the relief  
25 sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
26 Procedure." Id. at § 78u-4(a)(3)(B)(iii)(I). The presumption of most adequate plaintiff may be rebutted by  
27 evidence that the designated plaintiff "will not fairly and adequately protect the interests of the class" or "is  
28

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1 subject to unique defenses that render such plaintiff incapable of adequately representing the class." Id. at §  
2 78u-4(a)(3)(B)(iii)(II).

3 In the Ninth Circuit, In re Cavanaugh, 306 F.3d 726, 729-30 (9th Cir. 2002), governs lead plaintiff  
4 selection and establishes a three-step process. First, as discussed above, timely and complete notice of the  
5 action must be published. Id. at 729. Second, the district court considers the losses suffered by potential lead  
6 plaintiffs and selects "the one who 'has the largest financial interest in the relief sought by the class' and  
7 'otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.'" Id. at 730, citing 15  
8 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Thus the court must determine which plaintiff "has the most to gain from the  
9 lawsuit." Cavanaugh, 306 F.3d at 730. Finally, the court focuses on that plaintiff to ensure that the proposed  
10 lead plaintiff "satisfies the requirements of [Fed. R. Civ. Pro.] 23 (a), in particular those of 'typicality' and  
11 'adequacy.'" Id.

12 A plaintiff who satisfies the first two steps becomes the "presumptively most adequate plaintiff." Id.  
13 In step three, other plaintiffs have the opportunity to rebut the presumptive lead plaintiff's showing of typicality  
14 and adequacy. Id. at 730, citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

15 Once the court has designated a lead plaintiff, the lead plaintiff "shall, subject to the approval of the  
16 court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v). A court generally  
17 should accept the lead plaintiff's choice of counsel unless it appears necessary to appoint different counsel to  
18 "protect the interests of the class." Id. at § 78u-4(a)(3)(B)(iii)(II)(aa). In the Ninth Circuit, Cavanaugh  
19 establishes the standard for approval of lead counsel. "[T]he district court does not select class counsel at all,"  
20 id. at 732; instead, the district court generally approves the lead plaintiff's selection of counsel.

21  
22  
23  
24 ///

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**DISCUSSION****A. Motion to consolidate**

Both proposed lead plaintiffs have filed motions to consolidate the seven related cases pending in the Northern District of California against BEA Systems, Inc., and both motions are unopposed. The Court GRANTS the motions to consolidate.

**B. Competing motions to appoint lead plaintiff and approve lead counsel**

The notice of this action was posted on Business Wire, a widely circulated national business-oriented publication. See Bishop Decl., Ex. A; Check Decl., Ex. B. The Zwaiter Group and ARCA have both filed timely motions for appointment as lead plaintiff and submitted acceptable sworn certifications. See Bishop Decl., Ex. B; Check Decl., Ex. A. The only task that remains is to determine which movant is the most adequate plaintiff.

**1. Financial interest in the litigation**

The Court must first determine which movant has "the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii). The Zwaiter Group asserts that its financial interest in the litigation is \$242,625, distributed as follows: Zwaiter – \$138,221; Kalil – \$55,804; and Pardun – \$48,600. Zwaiter Group's Mot. at 2:20; Bishop Decl., Exs. B, C. ARCA asserts that it has the largest financial interest in the case, with losses of \$255,042. ARCA's Mot. at 2:1-2; Check Decl., Ex. C.

ARCA claims that the Zwaiter Group's loss figures are inflated because group member John Kalil's sales figures for May 13, 2004, do not match the Bloomberg trading data for that date. Specifically, Kalil states that he sold 3,800 shares at \$9.22 per share and 10,200 shares at \$9.10 per share for a loss of \$55,804, but ARCA states that BEA Systems stock traded at a low of \$10.49 per share that day. See ARCA Opp'n, Ex. A. Applying these figures, ARCA calculates the Zwaiter Group's total loss at \$223,621. ARCA's Opp'n at 3:13. The Zwaiter Group counters that, while BEA stock did close on May 13, 2004 at \$10.78, the stock price dropped on after-hours trading and opened at \$9.04 on May 14, 2004. Zwaiter Group's Surreply at 1:8-11; Exs. 1-2.

1 Regardless of which figures are used to calculate the Zuaiter Group's losses, the Court finds that  
 2 ARCA has the largest financial interest in the litigation, and is thus entitled to the presumption of most adequate  
 3 plaintiff, if it meets the requirements of typicality and adequacy.

#### 4 5 2. Typicality and adequacy

6 While the Zuaiter Group does not dispute ARCA's higher loss figures, it argues that ARCA should not  
 7 serve as lead plaintiff because ARCA is an atypical member of the class. Specifically, the Zuaiter Group alleges  
 8 that ARCA "engaged in a suspicious pattern of trading which included short selling BEA stock" during the Class  
 9 Period. Zuaiter Group's Opp'n at 2:21-24. As an alleged short-seller and possible "hedge fund," the Zuaiter  
 10 Group contends, ARCA intended to drive down the price of stock so that it could buy more at a lower price,  
 11 and therefore its interests are not aligned with those of other class members.<sup>2</sup> In addition, the Zuaiter Group  
 12 questions whether ARCA's clients have authorized ARCA to litigate on their behalf, and points out that there  
 13 is a pending case before the Ninth Circuit regarding whether an "investment advisor" may be appointed as lead  
 14 plaintiff. Id. at 3:22-25; see id., Ex. 1 (In re Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund  
 15 v. Anchor Capital Advisors, No. 04-73146). It contends that ARCA has not provided specific information  
 16 about its structure, clients, whether it has notified its clients of its motion for appointment as lead plaintiff, or  
 17 what "sophistication and resources" it has to "effectively manage this litigation." Zuaiter Group Opp'n at 1:7-  
 18 14.

19 ARCA responds that Zuaiter Group has not shown that ARCA engaged in short selling or established  
 20 why ARCA "appears" to be a hedge fund or asset manager. ARCA states that it is a mutual fund manager that  
 21 invested in BEA Systems on behalf of its own mutual funds, not on behalf of individual clients who control those  
 22 funds or receive investment advice from ARCA, and attaches a declaration from its Managing Director in  
 23 support of these claims. ARCA Reply at 4:10-14; see Pillette Decl., Ex. A (Decl. of Dr. Attilio Ferrari) ¶ 2,  
 24

25 <sup>2</sup> The Zuaiter Group bases its claim that ARCA engaged in short-selling by pointing to the fact that  
 26 ARCA purchased 254,388 shares of BEA Systems stock for \$12.2776 on November 19, 2003; it sold them  
 27 for a profit of \$0.2206 per share, a total of \$56,118 one week later; just over three weeks later, it purchased  
 28 353,715 more shares for \$12.3378 and sold these over the next two months for profits ranging from \$1.7957  
 per share to \$0.6074 per share, totaling \$371.269. It then had 88,430 shares left, and it bought 88,430 more,  
 of which it sold 36,397 two weeks before the May 13, 2004 announcement. See Zuaiter Group Opp'n at 3:7-  
 16. Without more, the Court is unpersuaded that this reflects short-selling.

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1 4. Therefore, ARCA has full authority to bring suit, and Dr. Ferrari will actively monitor the litigation. *Id.* at  
2 ¶ 4-5. ARCA also argues that, as a large investor, it is precisely the kind of prototypical "institutional investor"  
3 that Congress intended to serve as lead plaintiff under the PSLRA. ARCA Mot. at 8:12-25.

4 By contrast, ARCA argues, the Zuaiter group does not survive the "rule of reason," under which the  
5 proposed group of plaintiffs must "actively represent the class." This Court applies this rule of reason on a  
6 case-by-case basis to determine whether an asserted group "has demonstrated the ability to represent the class  
7 and direct the litigation without undue influence from counsel." *In re Versata, Inc. Sec. Litig.*, 2001 U.S. Dist.  
8 LEXIS 24270, at \*21 (N.D. Cal. Aug. 20, 2001). Because the Court lacks any specific information about  
9 the three individuals in the Zuaiter Group, ARCA argues that it cannot ensure that this group of plaintiffs has  
10 the sophistication and business knowledge to adequately represent the class and direct the litigation without  
11 undue influence from counsel. *In re Versata*, at \*18-\*22.<sup>3</sup>

12 The Court finds that ARCA meets the typicality and adequacy requirements. To meet the typicality  
13 requirement, the claims of a lead plaintiff and class members need not be identical. *In re Enron Corp. Sec.*  
14 *Litig.*, 206 F.R.D. 427, 445 (S.D. Tex. 2002), citing *In re Lucent Techs., Inc. Sec. Litig.*, 194 F.R.D. 137,  
15 150 (D.N.J. 2000) ("the typicality requirement is satisfied when the plaintiff's claim arises from the same event  
16 or course of conduct that gives rise to the claims of other members and is based on the same legal theory.").  
17 In fact, "the test for typicality is not demanding . . . [T]he critical inquiry is whether the class representative's  
18 claims have the same essential characteristics of the putative class." *In re Enron*, at 445, n.10, citing *Sturman*  
19 *v. Exxon Corp.*, 280 F.3d 554, 562-63 (5th Cir. 2002). As the court explained in *Deutschman v. Beneficial*  
20 *Corp.*, 132 F.R.D. 359, 373 (D. Del., 1990), "the focus of the typicality inquiry is not on plaintiff's behavior,  
21 but defendants'." If defendants' course of conduct gave rise to all class members' claims and if "defendants  
22 have not taken any action unique to the named plaintiff, then the representative's claim is typical." *Id.* (citations  
23 omitted). Here, the claims of all plaintiffs, including ARCA, are based on whether BEA Systems' alleged  
24 misrepresentations injured its stockholders by artificially inflating its stock price. Moreover, the Court is  
25

26  
27 <sup>3</sup> The Court does not agree with ARCA that specific information from proposed lead plaintiffs is always  
28 required. In *Versata*, the Court relied on declarations submitted by the putative plaintiffs to establish their  
business sophistication, but did not expressly require them, like the district court in *In re Network Associates*  
*Inc. Sec. Litig.*, 76 F.Supp.2d 1017 (N.D. Cal. 1999).



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1 satisfied that ARCA is neither a hedge fund engaged in short selling nor an investment advisor acting without  
2 the authorization of its clients.

3 The representative must have sufficient interest in the case's outcome to ensure vigorous advocacy.  
4 The Court finds no evidence of any antagonism between the interests of ARCA and the class. ARCA has  
5 certified its willingness to serve as representative plaintiff and has retained counsel experienced in litigation  
6 securities class actions. No challenge has been made to ARCA's selection of counsel.

7 The Court finds that ARCA, as the plaintiff with the largest financial stake in the litigation, also satisfies  
8 the typicality and adequacy tests necessary to serve as lead plaintiff in this litigation.

9  
10 **CONCLUSION**

11 For the foregoing reasons and for good cause shown, the Court hereby GRANTS the motions to  
12 consolidate all related actions. The Court GRANTS ARCA's motion for appointment as lead plaintiffs along  
13 with Schiffirin & Barroway LLP as lead counsel and Green & Jigarjian LLP as liaison counsel. The motion by  
14 the Zuaite Group is DENIED.

15 Counsel for ARCA is ordered to prepare, circulate for approval as to form and submit to the Court  
16 an order of consolidation and an Amended Consolidated Complaint, all to be filed on or before October  
17 15, 2004.

18  
19 **IT IS SO ORDERED.**

20  
21 Dated: September 24, 2004

S/Susan Illston

22 SUSAN ILLSTON  
23 United States District Judge  
24  
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28



Westlaw.

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## C

### Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, N.D. Ohio, Eastern  
Division.

In re: THE GOODYEAR TIRE & RUBBER  
COMPANY SECURITIES LITIGATION  
No. 5:03 CV 2166.

May 12, 2004.

Jack Landskroner, Cleveland, OH, for Plaintiff.  
Jack Morrison, Jr., Thomas R. Houlihan, Akron, OH,  
Jacob B. Radcliff, Jerome S. Hirsch, Jonathan Lerner,  
Lauren Aguiar, New York, NY, John T. Billick,  
Cleveland, OH, for Defendants.

### MEMORANDUM OPINION & ORDER

[Resolving Docs. 13, 16, 17 in case # 5:03CV2166  
and Doc. 12 in case # 5:03CV2210]

#### I. Introduction

#### ADAMS, J.

\*1 The above-captioned case is an action for securities fraud brought on behalf of shareholders of The Goodyear Tire & Rubber Company (the "Shareholders") against Defendants The Goodyear Tire & Rubber Company (Goodyear), Robert J. Keegan, Robert W. Tiekens, Samir G. Gibara, Stephanie W. Bergeron, John W. Richardson, and Richard J. Kramer, (collectively referred to as "Defendants"). The Shareholders base their claims on violations of Section 10(b) of the Securities and Exchange Act of 1934, Section 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5, which was promulgated thereunder. The action was filed as a class action, excluding from the class Defendants, directors and officers of Goodyear, their families and affiliates.

On December 31, 2003, this Court entered an order consolidating all individual actions related to this matter. Shortly thereafter certain individual movants filed motions requesting appointment as lead plaintiff in the consolidated action. The first group of movants consists of the Alaska Electrical Pension Fund and the Central States, Southeast and Southwest Areas

Pension Fund (the "Institutional Funds").<sup>FN1</sup> The second group of movants consist of funds A57, C16 and NK1, which are part of the fund family managed by Capital Invest, die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH, a fund management company located in Vienna, Austria (Capital Invest).<sup>FN2</sup> The last movant is Flamina Holdings, AG (Flamina Holdings).<sup>FN3</sup> Flamina Holdings is a holding entity for two individual investors, Mr. Michael May and Ms. Christina May.

<sup>FN1</sup> ECF Doc. 16.

<sup>FN2</sup> ECF Doc. 17.

<sup>FN3</sup> Flamina's motion was filed as ECF Doc. 12 in case 5:03CV2210.

On February 10, 2004, the Court held a hearing at which time counsel for each of the proposed lead plaintiffs had an opportunity to present their arguments. Counsel for the Institutional Funds, Capital Invest and Flamina were present at the hearing.<sup>FN4</sup> The Court has reviewed the parties' motions, responses, and replies thereto. It has also fully considered the arguments presented at the hearing.

<sup>FN4</sup> The Court notes that a motion filed by movant Richard Berman is still pending on its docket. Mr. Berman was not represented by counsel at the hearing. Therefore, the Court deems his motion withdrawn. Even if the Court seriously considered Mr. Berman's motion, however, it would not appoint him as lead plaintiff in this action. By Mr. Berman's own admission, he has lost only \$54,730, which is much less than the losses the other movants allegedly suffered. (Berman, Mot. for Lead Plf. at 9).

#### II. The Alleged Losses

The Institutional Funds request appointment as lead plaintiff based on their alleged loss of more than \$3.7 million in connection with the purchase of over 188,000 shares of Goodyear securities between the time of October 13, 1998 and October 22, 2003 (the "Class Period"). The Institutional Funds also request

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approval of their selection of lead counsel, William S. Lerach and Tor Gronborg of Milberg, Weiss, Bershad, Hynes & Lerach LLP and Landskroner-Grieco, Ltd. as liaison counsel.

Likewise, Capital Invest requests appointment as lead plaintiff based on its loss of approximately \$1.2 million in connection with its acquisition of 83,100 shares of Goodyear common stock during the class period. Capital Invest also requests approval of its selection of lead counsel the law firm of Bernstein, Litowitz, Berger & Grossman, LLP (Bernstein Litowitz) and the law firm Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., LPA (Climaco Lefkowitz) as liaison counsel.

\*2 Flamina Holdings requests appointment as lead plaintiff based on its alleged loss of \$2 million in connection with its acquisition of common stock and options. Flamina Holdings also requests approval of its selection of lead counsel the law firm of Scott & Scott and the law firm Tzangas, Plakas, Mannos, & Recuperio as liaison counsel. However, Flamina Holdings' stated losses are based on its losses plus the losses of Goodyear Tireworkers Independent Unity of the USWA Local 307 Topeka (GTWJU), who no longer seeks appointment as lead plaintiff. GTWJU was originally a co-movant with Flamina Holdings. However, it subsequently withdrew from the motion.<sup>FN5</sup> At the hearing on this matter, Flamina Holdings represented that its loss alone was only \$885,000.

FN5. ECF Doc. 32, filed in case 5:03CV2166.

### III. Capital Invest is Appointed as Lead Plaintiff

The Private Securities Litigation Reform Act (PSLRA) sets forth the procedure that governs appointment of the lead plaintiff in actions arising under the Securities and Exchange Act of 1934 when such an action is brought as a class action under the Federal Rules of Civil Procedure. *See generally* 15 U.S.C. § 78u-4(a)(1) and (a)(3)(B)(i). This procedure first requires that the plaintiff who files the initial action, within 20 days of filing, publish a notice to the class informing the class members of their right to file a motion for appointment as lead plaintiff. *Id.* at § 78u-4(a)(3)(A)(i).<sup>FN6</sup>

FN6. Here, the first notice of pendency was published over *The Business Wire* on

October 23, 2003. Consistent with the PSLRA, the notice advised potential class members of the pendency of the action, the claims asserted therein, the purported class period, and that any member may, within 60 days from the date of the notice, move the Court to serve as lead plaintiff in the action. *Id.* at § 78u-4(a)(3)(A)(i).

The PSLRA also provides that within 90 days after publication of notice, the district court shall consider the class members' motions and shall appoint as lead plaintiff the member or members of the class that the Court determines most capable of adequately representing the interests of the class members. <sup>FN7</sup> *Id.* at § 78u-4(3)(B)(i). When making the determination of "most adequate plaintiff," the PSLRA states that:

FN7. The Court acknowledges that this Order designating lead Plaintiff was not issued within 90 days after publication of notice. However, the Court was not able to comply with the 90-day provision in this case. Based on the Court's trial schedule it was not able to hold the hearing before expiration of the 90-day period. Accordingly, the Court did not have the requisite information on which to base its decision. *In re PRI Automation, Inc. Securities Litigation*, 145 F.Supp.2d 138, 144-45 (D.Mass.2001) (noting that compliance with the 90-day provision in some cases would require a district judge to make an uninformed decision and finding the 90-day provision to be an unconstitutional intrusion on judicial functions). Moreover, the Court needed time after the hearing to appropriately consider the parties' motions and focus on selecting the lead plaintiff and lead counsel best suited to adequately and fairly represent the interests of the plaintiff class in this case. *See id.*

[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under [the PSLRA] is the person or group of persons that - (aa) has either filed the complaint or made a motion in response to a notice ...; (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

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*Id.* § 78u-4 (3)(B)(iii)(I)(aa)-(cc). The above presumption may only be rebutted by proof that the presumptive lead plaintiff (1) will not fairly and adequately protect the interests of the class, or (2) is subject to "unique defenses" that render such plaintiff incapable of adequately representing to the class. *Id.* § 78u-4(a)(3)(B)(iii)(I)(aa)-(bb). The lead plaintiff selected by the Court has the discretion to retain counsel of its choice to represent the class, subject to court approval. *Id.* § 78u-4(a)(3)(B)(v).

Here, all movants have timely filed their motions to be appointed lead plaintiff in this action. Accordingly, the Court now turns to its determination of the movants' relative financial interests in the relief sought by the class.

#### IV. Largest Financial Interest

\*3 The PSLRA does not provide any guidance concerning the method of calculating which plaintiff has the "largest financial interest." See *id.* 78(u)(a)(3)(B)(iii)(I)(bb). This Court will calculate financial interest employing a four-factor inquiry recognized by a host of other district courts. See, e.g., *In re Olsten Corp. Sec. Litig.*, 3 F.Supp.2d 286, 295 (E.D.N.Y.1998); *In re Nice Sec. Litig.*, 188 F.R.D. 206, 217 (D.N.J.1999); *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 375 n. 4 (E.D.Va.2003); *In re Comedisco Sec. Litig.*, 150 F.Supp.2d 943, 945 (N.D.Ill.2001). The four factors relevant to the calculation are: (1) the number of stock shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered during the class period. The Court separately addresses each movant's financial interest in light of these factors, subject to the caveat that this discussion is limited to resolving the lead plaintiff motions, and is not an ultimate determination of liability and damages.

##### A. *Flamina Holdings*

Under the foregoing analysis, Flamina Holdings has not demonstrated the most significant financial interest in this litigation. Flamina Holdings purchased and sold 65,000 shares of Goodyear stock during the Class Period, for a net purchase of zero shares. The company expended \$1,550,000 and received \$665,400, incurring a total loss of \$884,600. The

record thus indicates that, of the three movants for lead plaintiff, Flamina Holdings expended the least amount of funds and purchased the fewest (total) shares of Goodyear stock during the Class Period. As the Court discusses below, Flamina Holdings' \$884,600 loss is not the greatest loss incurred by the movants. Accordingly, Flamina Holdings is not the best candidate for lead plaintiff.

Flamina Holdings' motion is denied on the additional ground that the movant is a holding company for two individual investors and thus is not an "institutional investor." The legislative history of the PSLRA reflects a preference for institutional investors in the lead plaintiff role. See *In re Telxon Corp. Sec. Litig.*, 67 F.Supp.2d 803, 821 (N.D. Ohio 1999).

Flamina Holdings' alternative request for appointment as a co-lead plaintiff also is denied. A co-lead plaintiff appointment is not warranted under the circumstances present in this case and likely would result in increased costs and duplication of efforts.

##### B. *The Institutional Funds*

The Institutional Funds' motion also is denied on the ground that the Institutional Funds do not have the most significant financial interest in this litigation based on damages incurred from purchases and sales of Goodyear securities during the Class Period. Although the movants' respective representations of loss seem to indicate that the Institutional Funds suffered the greatest damages by a considerable margin, the Institutional Funds' claimed \$3.7 million loss is illusory.

\*4 The Institutional Funds have calculated their purported \$3.7 million loss based solely on a first-in-first-out (FIFO) methodology, ignoring the four-pronged inquiry set forth above. In this situation, FIFO grossly inflates the Institutional Funds' damages because the Institutional Funds are a "net seller" of Goodyear stock. The Institutional Funds sold 202,714 more Goodyear shares during the Class Period than they purchased, and received more profits from the sale of Goodyear stock during the Class Period than losses on the purchase of Goodyear securities.

Application of the four-factor test reveals FIFO's inaccuracy under the circumstances present here. The Institutional Funds purchased 188,675 shares of Goodyear stock during the Class Period and sold

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391,389 shares for a net sale of 202,714 shares. A determination of net expenditures, or total monies received from sales (\$12,910,959.72) of Goodyear stock less total funds expended on purchases (\$5,299,423.81), verifies that the Institutional Funds received a total of \$7,611,535.91 in net proceeds as a result of their high-volume Goodyear stock sales during the Class Period. The Institutional Funds may have benefitted from the alleged fraud in view of the fact that they earned millions of dollars on net sales of Goodyear stock during the Class Period. Accordingly, the Institutional Funds cannot establish the largest financial interest in the relief sought by the class.

Similarly, Central States and Alaska both are net sellers. Central States profited in the amount of \$8,460,217.87 from its sales of Goodyear Stock during the Class Period. Although Alaska expended \$848,681.96 more than it received, its loss is not even half as great as that claimed by Capital Invest. As such, the Court rejects the Institutional Funds' contention that they have incurred a greater financial interest in this litigation than any other lead plaintiff applicant. See *Weisz v. Calpine Corp.*, No. C 02-1200 SBA, Slip. Op. At 12 (N.D. Cal. Aug. 19, 2002) (rejecting motion of lead plaintiff movant who was a net seller and, as a result, "may have actually profited, not suffered losses as a result of the allegedly artificially inflated stock price"); *Comdisco*, 150 F.Supp. at 945-46 (same). See also *In re McKesson HBOC Sec. Litig.*, 97 F.Supp.2d 993, 996-97 (N.D. Cal. 1999) ("[a] net purchaser will, presumably, have a greater interest in the litigation, because he or she was induced by the fraud to purchase shares, and has been left 'holding the bag' when the fraudulent inflation is revealed.")

Even if the Court ignores the flaws inherent in the Institutional Funds' FIFO methodology, the Institutional Funds are not an acceptable lead plaintiff as they may be subject to unique defenses. Alaska sold all of its shares of Goodyear stock prior to the disclosure of the alleged fraud. Likewise, it appears that Central States sold the significant majority of its shares prior to the disclosure. Thus, both Alaska and Central States undoubtedly will face motions to dismiss and/or for judgment as a matter of law on the ground that certain losses suffered by them were not caused by the alleged fraud. See *In re Cable & Wireless*, 217 F.R.D. at 379 (stating that the lead plaintiff movant who sold its shares "before the fraud ... was revealed to the public ... could not have suffered any loss as result of the Defendants' alleged fraud"); *In re MicroStrategy Inc. Sec. Litig.*, 110

F.Supp.2d 427, 437 n. 23 (E.D. Va. 2000) (holding that a lead plaintiff movant who sold shares in the subject company prior to the disclosure of the fraud also may be subject to "unique defenses based on the timing of its loss"); *Arduini/Mesina P'ship v. Nat'l Med. Fin. Servs. Corp.*, 74 F.Supp.2d 352, 361-62 (S.D.N.Y. 1999) (granting the defendants' motion to dismiss the plaintiff's claims where plaintiff sold all of his shares in the subject company prior to disclosure of the fraud and could not demonstrate that his damages were caused by the defendants' fraudulent statements).

\*5 Moreover, the Institutional Funds' motion is denied in light of this Court's previous ruling that lead plaintiff movants must have a pre-existing relationship and basis for acting as a collective unit to qualify under the PSLRA as a viable lead plaintiff group. *In re Telxon*, 67 F.Supp.2d at 823 (O'Malley, J.). At the February 10, 2004 hearing, counsel for the Institutional Funds admitted that Central States and Alaska have no relationship pre-dating this litigation and were joined solely for the purpose of prosecuting this case. As such, the Institutional Funds have improperly aggregated their losses for the purpose of their lead plaintiff motion.

### C. Capital Invest

Having denied the competing lead plaintiff applications, the Court now turns to Capital Invest's motion. Capital Invest has the most significant financial interest in this litigation. It purchased the most shares of Goodyear Stock during the Class Period and sold no shares, for a net purchase of 83,100 shares, a net expenditure of \$1,779,900.36, and a claimed loss of approximately \$1,200,000. Thus, Capital Invest is the presumptive lead plaintiff subject to the requirements of Rule 23 (discussed *infra*.)

Capital Invest's qualifications for lead plaintiff status are not susceptible to the Institutional Funds' challenges. The Court briefly examines said challenges below.

Contrary to the Institutional Funds' contention, Capital Invest possesses standing to assert securities fraud claims on behalf of the clients for whom it purchases and sells securities. A number of district courts have held that an investment manager has standing to bring securities claims on its clients' behalf if it is the clients' attorney-in-fact and has specific authority to recover its clients' investment

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losses. See, e.g., Weingberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D. 248, 255 (S.D.N.Y.2003) (stating that "when the investment advisor is also the attorney-in-fact for its clients with unrestricted decision making authority, the investment advisor is considered the 'purchaser' under the federal securities laws with standing to sue in its own name"); In re DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 299 (D.Del.2003) (same); In re Rent-Way Sec. Litig., 218 F.R.D. 101, 106-09 (W.D.Pa.2003) (same); EZRA Charitable Trust v. Rent-Way, Inc., 136 F.Supp.2d 435 (W.D.Pa.2001) (same). Capital Invest's Declaration provides, "Capital Invest controls and manages the Funds and acts as attorney-in-fact for them. Capital Invest has full and complete authority to purchase and sell securities for each of the funds, and to institute legal action on their behalf." Based on the Declaration, the other evidence of record, and the caselaw cited above, Capital Invest has standing to bring suit and serve as lead plaintiff in this litigation.

The Institutional Funds' attempt to discredit Capital Invest on the ground that it is a non-domestic (Austrian) investment firm, and therefore an uncommitted and uncontrollable candidate for lead plaintiff, is insupportable. Capital Invest has testified in its Declaration and through its attorneys at the February 10, 2004 hearing that it has vast resources, that it is committed to working to obtain the best possible recovery for the plaintiff class, and that its representatives will be available in person to the Court. Further, the Institutional Funds' comment that Capital Invest is located almost 4500 miles from the Court lacks a measure of ingenuousness given that Alaska itself is located over 4000 miles away and has not provided the Court with any proof that it is willing to make its representatives available to the Court as necessary. Further, Austrians are, by treaty, expressly entitled to the same rights and privileges before United States courts as United States citizens. See Treaty between the United States of America and Austria of Friendship, Commerce and Consular Rights, June 19, 1928, U.S.-Aus., art. IX, 47 Stat. 1876, 1931 WL 29977 (U.S. Treaty). Even in the absence of a treaty, to exclude a foreign investor from lead plaintiff status on nationality grounds would defy the realities and complexities of today's increasingly global economy.

\*6 For all of the foregoing reasons, Capital Invest has the greatest financial interest in this case and is the presumptive lead plaintiff subject to the strictures and requirements of Rule 23. The Court now turns to its Rule 23 analysis.

#### V. Adequacy & Typicality Under Rule 23(a)

Having determined that Capital Invest is the largest stakeholder does not end this Court's analysis. The PSLRA requires that the lead plaintiff also satisfy the requirements of Federal Rule 23.<sup>FN8</sup> Here, the Court must find that Capital Invest would satisfy Rule 23's typicality and adequacy requirements before it can appoint Capital Invest as lead plaintiff.<sup>FN9</sup> See In re Century Business Services Sec. Litig., 202 F.R.D. 532, 539 (N.D. Ohio 2001) (analyzing the typicality and adequacy requirements of Rule 23 in a securities class action governed by the PSLRA); See also In re Telxon, 67 F.Supp.2d at 807 n. 10 (noting that class action analysis under Rule 23 in securities actions hinges on the typicality and adequacy requirements of the rule). Based on the evidence before it, this Court finds that Capital Invest would satisfy the typicality and adequacy requirements of Rule 23.

FN8. Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

FN9. Upon motion to certify this action as a class action, the Court will undertake the "rigorous analysis" necessary for a determination of whether the complete prerequisites of Rule 23 are met. In re American Medical Systems, Inc., 75 F.3d 1069, 1079 (6th Cir.1996) (citing General Tel. Co. v. Falcon, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). As the Sixth Circuit has noted, "[a] class is not maintainable as a class action by virtue of its designation as such in the pleadings." *Id.* Because, in this case, a consolidated complaint has not been filed, the Court will reserve the issue of whether a class will be certified for a later date.

Typicality is governed by Rule 23(a)(3), which requires that the claims or defenses of the



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representative party be typical to the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). In other words, a sufficient relationship must exist between the injury to the named representative and the conduct affecting the class. In re American Medical Sys. Inc., 75 F.3d 1069, 1082 (6th Cir.1996) (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3-13, at 3-76 (3d ed.1992)). "Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.*

Capital Invest satisfies the typicality requirement. It seeks to represent a class of purchasers of Goodyear securities who have non-competing and non-conflicting interests. All class members purchased or acquired Goodyear stock during the Class Period and allegedly suffered a loss as the result of Defendants' conduct in connection therewith. As Capital Invest aptly notes, its claims deal with the same issues that pertain to the claims of the other class members. Namely, these issues are (1) whether Goodyear issued false and misleading statements during the Class period, (2) whether Defendants acted knowingly and/or with deliberate recklessness in issuing these allegedly false and misleading statements, (3) whether the market price of Goodyear stock was artificially inflated during the Class Period because of Defendants' allegedly wrongful conduct, and (4) whether the members of the class have sustained damages, and the amount of such damages. Because Capital Invest's claims deal with the same issues that pertain to the other class members, its interests are clearly aligned with those of the class. *Id.*

\*7 Adequacy is governed by Rule 23(a)(4), which allows certification of a class only if the class representative will fairly and adequately protect the interest of the class. Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has set forth two criteria for determining adequacy. First, the class representative must have common interests with those unnamed class members. In re American Medical Systems, Inc., 75 F.3d 1069, 1082 (6th Cir.1996) (citation omitted). Second, it must appear that the class representative will vigorously prosecute the action with the assistance of qualified counsel. *Id.* According to the circuit, "[t]he adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentive to pursue the claims of the other class

members." *Id.*

Here, Capital Invest has common interests with the unnamed members of the class. Both Capital Invest and the other class members seek to recover their losses in connection with Defendants' alleged conduct. There is nothing to indicate that Capital Invest, as the class representative, would not vigorously prosecute the interests of the class. Clearly, Capital Invest has the need seek to recovery for its own losses. As such, there is no reason for this Court to find that Capital Invest would not just as vigorously prosecute and protect the interests of the class. As Capital Invest notes, there is no evidence before the Court of any antagonism between the interests of Capital Invest and the interests of the class members. Therefore, the Court sees no reason why Capital Invest cannot or would not vigorously prosecute the class members' claims.

There is also no evidence that the proposed lead counsel, Bernstein Litowitz, is not qualified counsel. In making this determination, the Court must consider whether the proposed counsel are qualified, experienced, and generally able to conduct the litigation. See Stout v. J.D. Byrider, 228 F.3d 709, 717 (6th Cir.2000). Having reviewed the resume of Bernstein Litowitz, proposed lead counsel in this action, the Court notes that the firm's litigation practice concentrates in the area of securities class actions. The firm also markets itself as "the nation's leading firm in representing institutional investors in securities fraud class action litigation." <sup>FN10</sup>

<sup>FN10</sup>. See Capital Invest, Mot. to Consolidate at Exh. D.

A review of the firm's resume reveals that it is qualified in securities class action lawsuits. Other courts have found this as well. See, e.g. Piven v. Sykes Enterprises, Inc., 137 F.Supp.2d 1295, 1306 (M.D.Fla.2000) (finding Bernstein Litowitz experienced in litigating class action lawsuits); Osher v. Guess?, Inc., No. CV01-00871LGB, 2001 WL 861694 at \*4 (C.D.Cal.2001) (unreported) (finding Bernstein Litowitz experienced in litigating complex securities actions after reviewing the firm's resume); Armour v. Network Assoc., Inc., 171 F.Supp.2d 1044, 1052 (noting that "[t]he firm resume of Bernstein Litowitz reveals its competence to provide class representation in a securities class action."). In fact, the firm's literature boasts numerous statements from various district court judges across the country who have commented on the outstanding performance of

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Bernstein Litowitz in various actions where excellent results have been achieved for plaintiff class members. On the whole, there is nothing that would indicate to this Court that Bernstein Litowitz is anything but qualified, experienced, and generally able to conduct the litigation in this case.

#### VI. Conclusion

\*8 For the reasons stated above, Capital Invest's motion for appointment as lead plaintiff is granted. In keeping, its request appoint the law firm of Bernstein Litowitz as lead counsel and the law firm of Climaco Lefkowitz as liaison counsel is granted. All other pending motions are hereby denied.

IT IS SO ORDERED.

N.D. Ohio, 2004.

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